No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

GAMBLE ENTERPRISES, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF LOCAL NO. 24, AMERICAN FEDERATION OF MUSICIANS, AS AMICUS CURIAE

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Local No. 24, American Federation of Musicians, files this brief as amicus curiae, having obtained and filed with the Clerk of this Court the written consents of the parties to this case. Local No. 24 is at the very fulcrum of the issue presented to this Court. That issue is whether the demand by Local No. 24 that certain of its members be hired for actual work constituted a violation of Section 8(b)(6) of the Labor-Management Relations Act.

Local No. 24 is in full accord with the statement of the facts, the analysis of the issue and the legal arguments set forth in the brief of the Solicitor General. But it believes that certain factors of peculiar importance from the union standpoint should be emphasized and brought to this Court's attention as a supplement to that excellent brief.

Certainly a bona fide request by a labor union that additional men be employed—even though the employer does not want or need those men—does not fall within the accepted meaning of language which merely outlaws any attempt to cause an employer to pay any money, "in the nature of an exaction, for services which are not performed or not to be performed." Provided actual work by the additional men is contemplated, such a request cannot by any stretch of the lexicon be said to constitute the type of action so plainly referred to in Section 8 (b) (6). On the contrary, it is an attempt to secure money for services which are in fact to be performed.[1] And the money which is sought is money in payment for actual work, something quite different from "an exaction."

But by a wholly unwarranted abuse of the interpretative process, the court below has read Section 8 (b) (6) in a manner at war with the English language and with the clear legislative history

[1] The record is undisputed that Local No. 24 at all times requested that local members be employed to perform actual work. (R. 148, 361, 374.) Respondent seeks to avoid this crucial fact by making an unsupportable assertion that the union did not genuinely contemplate that it would actually perform work. (Brief, p. 32.) But the respondent is well aware that there was no duplicity in the request of Local No. 24. After the Board's decision in this proceeding, the respondent entered into a written agreement with Local No. 24 on March 5, 1951. This agreement was premised upon the same demand for additional employment that is in issue in this case. And this agreement was fully performed, with actual work being done by the employees.

behind that language. It has viewed Section 8 (b) (6) as if it proscribed any request for services which the employer unilaterally determines is unwanted, unneeded or unacceptable, regardless of whether actual work is contemplated by the request.[2] Even if the legislative history in some way supported such a reading of the section, the plain language used by the legislators would be controlling and the error of the judgment below would be manifest.[3] But the legislative backgrounds of few statutes so compellingly confirm the plain meaning of resulting statutory language as does the background of Section 8 (b) (6).

The court below read back into Section 8 (b) (6) that which Congress had deliberately taken out. It treated the section as though the original House version[5] had become the law, a version which spe-

[2] The court below said that the "dominant purpose" of Section 8(b)(6) was to prevent payment for services which the employer "does not want, does not need, and is not even willing to accept." (R. 398.)

[3] "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260. See also *United States* v. *St. Paul, M. & M. R. Co.*, 247 U.S. 310.

[4] "To translate this Act by a process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation." *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508-9.

[5] Section 12(a)(3)(B) of H.R. 3020, 80th Cong., 1st Sess., outlawed certain union featherbedding practices, defined in Section 2(17) to include any practice which has the effect of requiring an employer "to employ or agree to employ any

cifically proscribed any attempt to require an employer "to employ or agree to employ any person or persons in excess of the number of employees reasonably required by such employer to perform actual services." But the House version, drawn from the Lea Act,[6] was discarded by the joint conference committee for two significant reasons: (1) it was felt that "it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many";[7] (2) constitutional problems, as then undetermined, were thought to be so implicit and so significant as to warrant a "wait and see" attitude.[8] The only provision that was adopted, said Senator Taft, was that "which makes it an unlawful labor practice for a union to accept money for people who do not work," a situation that was said "to be a fairly easy case, easy to determine."[9] The court below

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person or persons in excess of the number of employees reasonably required by such employer to perform actual services."

[6] 60 Stat. 89, 47 U.S.C. 506. The Lea Act, in prohibiting certain practices, was confined to the radio broadcasting industry.

[7] 93 Cong. Rec. 6441

[8] *Ibid.* These constitutional problems resulted in this Court's decision in *United States* v. *Petrillo*, 332 U.S. 1.

[9] *Ibid.* Senator Taft also stated that as a result of these considerations, "the conferees were of the opinion that general legislation on the subject of featherbedding was not warranted at least until the joint study committee proposed by this bill could give full consideration to the matter." 93 Cong. Rec. 6443.

At Page 17 of its brief in *American Newspaper Publishers*

turned its back on all this compelling legislative background. In reliance upon a single statement torn out of the context of a heated congressional debate,[10] it enacted what Congress rejected.

Indeed, the court below even went beyond what the original House version of Section 8 (b) (6) had provided. That version contemplated an administrative or judicial determination of how many employees were reasonably required by an employer. Congress denied that vast power to dispassionate public agencies. The court below vests that power in partisan, private employers. It establishes the unprecedented and grossly unfair doc-

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Association v. *National Labor Relations Board*, No. 53, this term, petitioner contends that this Court has formulated a conclusive legal definition of the term "work" to mean "exertion pursued necessarily and primarily for the benefit of the employer and his business", citing the *Tennessee Coal* (321 U.S. 592) and *Jewel Ridge* (325 U.S. 161) cases. This Court gave the short answer to this contention in its later decision in *Armour & Co.* v. *Wantock* (323 U.S. 126, 133), where it held that employment in a stand-by capacity was to be computed as part of the work week for the purposes of the Fair Labor Standards Act and admonished that "it is timely again to remind counsel that words of our opinions are to be read in the light of the facts under discussion."

[10] This statement was made by Senator Taft (93 Cong. Rec. 6446) during an exchange of views with Senator Pepper. This statement reads: "It is intended to make it an unfair labor practice for a man to say, 'You must have 10 musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway.' That is in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept." The context and true meaning of this "slip of the tongue" statement are correctly pointed out in the brief of the Solicitor General, p. 40 ff.

trine that an employer can legalize or illegalize union action by what he says he wants or needs or is willing to accept. His uncontrollable whim or economic prejudice thus becomes the statutory standard of illicit conduct. If the court below be correct, then Section 8 (b) (6) constitutes an extraordinarily unique and palpably unconstitutional delegation of legislative power.[11]

Needless to say, the interpretation given Section 8 (b) (6) by the court below wholly negates the concept of collective bargaining presumably encouraged by the Taft-Hartley Act. Unions need not exist, much less bargain, if they may only request what the employer already wants or needs to give them. Without a conflict in desires or needs

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[11] The version of Section 8(b)(6) which we have seen was explicitly disavowed by the conference committee was based upon the Lea Act. And under the corresponding language of the Lea Act, this Court has made it plain that "an employer's statements as to the number of employees 'needed' is not conclusive" in determining how many employees are needed on a job. The Lea Act problem, said this Court, was one to be administered by judges and juries in accordance with the will of Congress and on the basis of "many factors." *United States* v. *Petrillo*, 332 U.S. 1, 6-7. Indeed, if the whim of the employer were decisive, grave constitutional problems of vagueness under the Fifth Amendment would be present. It was in answer to the charge of unconstitutional vagueness that this Court in the *Petrillo* case read the Lea Act so as not to make the employer's desire determinative of the legality of union action. And much the same concern to avoid the vagueness charge is implicit in this Court's statement in *United States* v. *Local 807*, 315 U.S. 521, 532, that "The state of mind of the truck owner cannot be decisive of the guilt of these defendants."

unions would never have been formed and collective bargaining never conceived. If collective bargaining means anything it means that each party may advance proposals and make requests that the other party does not want, does not need and is not even willing to accept.[12]

The decision below is no less destructive of the essence of collective bargaining than would be a statute or decision prohibiting employers from requesting any contract term that the union does not want or does not need or is not willing to accept.

If illegality is to attach to every proposal which meets resistance the freedom which marks the bargaining process is irrevocably destroyed. And if that is the result intended by Section 8 (b) (6) something far more convincing than the reasoning of the court below is glaringly indicated.[13]

ECONOMIC IMPLICATIONS OF DECISION BELOW

One of the fundamental purposes of a labor organization—the task of securing new job oppor-

[12] The Labor-Management Relations Act was not designed to give governmental support to the substantive bargaining position of either party. *Labor Board* v. *American National Insurance Co.*, 343 U.S. 395, 401-404.

[13] For reasons best known to itself, the court below avoided any reference to, much less discussion of, the legislative and judicial authorities extensively cited below by the Labor Board. This unusual, even cavalier, treatment is emphasized by the court's exclusive reliance on Senator Taft's isolated statement, a statement upon which respondent expressly "did *not* rely" (emphasis respondent's) because "it appears to have been a momentary lapse on the Senator's part." (Reply brief below, p. 6.)

tunities for its members—is rendered illegal by the decision below. Labor organizations are created out of the need and desire on the part of workers, helpless as individuals, to obtain employment and to protect employment already obtained.[14] Without employed membership no union could survive. And collective bargaining, which is the declared policy of the federal government, necessarily presupposes employment.

Indeed, in a society in which near full employment is obtained only in times of war and in which from three to ten million workers are chronically unemployed, it is folly to assume that organized workers will do other than attempt to defend themselves against abiding threats of unemployment. Technological displacement, moreover, has become a growing threat to many employees.[15] The obvious realities of contemporary industrial life thus make it necessary as well as desirable that workers seek enhancement of their employment opportunities.

The American Federation of Musicians, because of the circumstances in the industries in which its members work, is peculiarly sensitive to the never-

[14] This basic fact is classically demonstrated in Perlman, A Theory of the Labor Movement (1928). See also the statement of this Court expressing agreement with the fact that "practically always the crux of a labor dispute is who shall get the job, and what the terms shall be." *United States* v. *Local 807*, 315 U.S. 521, 531.

[15] See Slichter, Union Policies and Industrial Management, pp. 164-281 (1941); TNEC Monograph 22, Technology In Our Economy, p. 3 (1941); Randle, Restrictive Practices of Unionism, 15 So. Eco. Jour. 171 (1948).

ending menace of unemployment. More than any other craftsmen in our economy, musicians are subject to loss of jobs as a result of competition by machine and by less expensive labor. The rapid growth of sound movies, the juke box and recorded music has aggravated the dismal job outlook for professional musicians.[16] For many Federation members music has necessarily become an avocation rather than a vocation. Fewer and fewer members find it possible to make a decent living from the musical profession. Small wonder, then, that they have been compelled to join together and take measures in self-defense.

These are some of the hard realities which have shaped the underlying labor policies of the federal government for many years. The thrust of the great labor and social legislation of the past twenty years has been toward the creation of employment opportunities and the adoption of other means that would minimize unemployment. It is unnecessary

[16] See Petrillo, Dim Future for Musicians in TV, International Musician, Vol. LI, p. 10 (August, 1952). "In the last twenty-five years, the market for music has grown by leaps and bounds, but full-time jobs for professional musicians have become steadily fewer. Mechanized music accounts for both the expanded market and the job shrinkage. Sound-track on film displaced 20,000 musicians who played in the silent movie theaters. The closing of most legitimate theaters and the virtual disappearance of road companies and vaudeville in the thirties, threw another 5,000 musicians out of work. . . . Today, 2,500 of the radio stations in the country employ no live musicians at all." Cluesmann, The Support of Live Music in an Electronic Age, International Musician, Vol. L, p. 9 (October, 1951).

to recite here all the many laws directed to that end which were spawned from the bitter experience of the great depression of the twentieth century. Such statutes as the Fair Labor Standards Act stand as permanent monuments to the modern governmental policy of spreading employment, of encouraging additional job opportunities which the employer might not need or be willing to concede. See *Overnight Motor Co. v. Missel*, 316 U.S. 572, 577-78. See also *United States v. American Federation of Musicians*, 47 F. Supp. 304, affirmed, 318 U.S. 741; *United States v. Carrozzo*, 37 F. Supp. 191, affirmed, 313 U. S. 539.

The decision below flouts that basic aspect in our national labor policy and illegalizes a basic objective of every union in the nation. Unless reversed, it would prohibit not only direct efforts to secure jobs but also such familiar union practices as strikes to reduce hours, to obtain overtime rates, to secure vacations or holidays or rest periods, in opposition to "speed-ups" and to resist mechanical displacement—all of which may be motivated in whole or in part by a desire to obtain more jobs than the employer thinks necessary or desirable or beneficial.

Surely it should take more than an offhand remark by one Senator to effectuate this traumatic uprooting of long and deeply imbedded traditions. Certainly so revolutionary a change should not be premised on a single, dubious observation, lifted

out of context, made in the heat of debate, in flagrant conflict with the language of the statute and totally inconsistent with the carefully prepared, studied remarks of the very author of that observation.

CONCLUSION

Hardly a day goes by but that some union does not make a request which calls for or necessarily requires the employment of additional employees and which is not resisted by employers on grounds of efficiency, economy, benefit or utility.

It is a measure of our freedom and a tribute to our system of law that such proposals are freely advanced and freely resisted without fear of sovereign intrusion or restraint. In the vast preponderance of instances the issue is resolved by discussion, concession or compromise. Where stalemates develop, parties are free to resort to peaceful, economic measures in defense of their positions.

We respectfully request that this Court preserve this freedom in accordance with the expressed will of Congress under any reasonable interpretation

of the plain language and intent of Section 8 (b) (6).

Respectfully submitted,

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